Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

United States Can Company, Complainant, vs. Southern California Edison Company, Defendant.	Case 01-08-018 (Filed August 3, 2001)

OPINION GRANTING COMPLAINT IN PART

I. Summary

This decision finds that complainant United States Can Company (US Can) 1) failed to establish that it did not receive the notices to interrupt and therefore, pursuant to the terms of the interruptible contract, US Can is responsible for the payment of excess energy charges for failing to interrupt on November 15 and December 4-7, 2000, and 2) did establish that Southern California Edison Company (Edison) failed to meet its contractual obligations to repair the automatic notification system within its targeted repair timeframe of approximately 30 days. The excess energy charge of $76,306.50 for US Can's failure to interrupt on the five event dates is reduced by the amount of charges assessed for December 6 and 7, 2000.

II. Background

On May 12, 1995, US Can and Edison entered into a contract for interruptible service (Contract) pursuant to which Edison agreed to provide interruptible service at US Can's Commerce, California facility. The Contract imposes obligations on both US Can and Edison. Specifically, US Can is obligated:

- To allow Edison to install Edison-owned notification equipment to notify US Can in the event that a notice of interruption is given by Edison;
- To provide a location and an uninterrupted power source for the automatic notification equipment;
- To provide two private unlisted phone lines, one for a private backup telephone line, and one for the automatic notification equipment;
- To provide Edison with access during reasonable business hours to the automatic notification equipment for maintenance and repair; and
- To reduce the demand imposed on the electric system upon receipt of a notice of interruption from Edison.

Under the terms of the Contract Edison is obligated:

- To install Edison-owned automatic notification equipment;
- To provide required maintenance and repair of the automatic notification equipment; and
- To notify US Can when Edison requires US Can to interrupt service.

From the inception of the Contract in May 1995 until November 2000, the automatic notification system (RTU) was operational and any notice from Edison to US Can to interrupt was done via the RTU. Edison tests US Can's RTU unit on at least a monthly basis, and for the first time during the contract period, on November 7, 2000, Edison determined that the RTU was malfunctioning. Edison notified US Can on November 14, 2000, that the RTU unit was not communicating properly and if Edison needed to notify US Can to interrupt, the

notice would be by way of the backup phone. The RTU was repaired and back in service by December 15, 2000.

Edison required US Can to interrupt on November 15, and December 4–7, 2000, the period during which the RTU was not performing, and notice from Edison to US Can was by way of the backup phone. US Can failed to interrupt and Edison assessed excess energy charges pursuant to the terms of the interruptible tariff of $76,306.50. US Can claimed it did not receive the notice to interrupt and challenged the excess energy charge. After informal attempts to resolve the dispute were unsuccessful, US Can filed a complaint against Edison on August 3, 2001, requesting that the Commission enjoin Edison from collecting the excess energy charge.

The gravamen of US Can's complaint is that it did not receive notice to interrupt pursuant to the terms of the Contract. The causes of action against Edison are: 1) breach of contract for failing to maintain the automatic notification system; 2) breach of contract for failing to provide notice in accordance with the contract; and 3) violation of Public Utilities Code Section 451 that requires "all charges demanded or received by any public utility . . . shall be just and reasonable." Edison denies the allegations in the complaint and raises numerous affirmative defenses.

Following an October 19, 2001, prehearing conference, the assigned administrative law judge (ALJ) issued a ruling establishing the scope of the proceeding and setting forth the procedural schedule. An evidentiary hearing was held on March 15, 2002, and the post-hearing briefs were submitted by April 30, 2002.

III. Dispute

The Contract establishes the rights, duties, and obligations of US Can and Edison. US Can's complaint alleges two breaches of that Contract: a failure to

notify US Can to interrupt in a manner consistent with the Contract, and a failure by Edison to maintain and repair the RTU. The focal point of the testimony and cross-examination at the hearing, and the post hearing briefs, was on whether Edison had proof that it gave US Can notice to interrupt by way of the backup telephone, and if it did, was notice in that manner sufficient under the Contract to subject US Can to excess fees when it failed to interrupt.

Both US Can and Edison agree that the RTU unit was not operating properly from November 14[1] through December 15, 2000, and therefore, the five notices to interrupt during this period were necessarily given by way of an alternative method.

IV. Arguments

A. US Can

US Can argues that the $76,306.50 penalty is not warranted by virtue of the fact that US Can did not knowingly fail to interrupt on the five dates in question. Pursuant to the previous five-year pattern of performance under the Contract, the RTU was the primary and official means of providing an interruption notice, and Edison had always given notice using the RTU. Maintenance and repair of the RTU was the responsibility of Edison, and it was only because Edison breached this obligation that the five notices to interrupt from November 15 through December 7, 2000, were given by way of the backup telephone—a method that had never before been utilized to give a notice to interrupt.

[1] Edison notified US Can on November 14, 2000, that the RTU was not functioning properly, but there was evidence that Edison learned of the problem as early as November 7, 2000. The dates are not critical to the resolution of the complaint since the parties agree that Edison took 38 days to repair the RTU.

US Can argues in the alternative, either that notification by way of the backup phone is not sufficient notice under the terms of the Contract to trigger the $76,306.50 penalty, or that it did not receive the notice since it has no internal record of such receipt.

US Can bolsters its position by presenting evidence that its internal policy and procedure is to shut down its facility on every occasion when it receives a notice to interrupt.[2] During the five-year Contract period, US Can shut down service on 43 occasions when it received a notice to interrupt by way of the RTU. US Can presented testimony that adhering to notices to interrupt is such a high priority at US Can that even though the backup telephone had never been previously utilized to give an interrupt notice, the company has a system in place to insure that if such a notice is given, the facility is immediately shut down. Specifically, Mr. Adkisson and Mr. Borders testified that the backup telephone was located in the security guard-house that is manned 24 hours a day/7 days a week. Mr. Adkisson discussed how the guards are instructed to log all calls received on the backup phone and to immediately contact a supervisor. Mr. Bacha testified for US Can that he prepared memoranda on the procedures to be followed if a call is received on the backup line, and the memoranda are posted in the plant facility and in the guard-house. The memoranda state that (1) upon receipt of notice from Edison, the facility must be immediately shut down; (2) the notice to shut down is non-negotiable.[3]

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[2] Evidence was presented that during a period when compliance with the interruptible service program was optional, US Can did not always reduce its power usage, but otherwise it has never failed to comply with interruption notices.

[3] Joint Exhibit 1, Attachment B.

1. Notice to Interrupt – Method of Notification

US Can contends, and Edison agrees, that it is Edison's "policy to use the RTU as the primary means or official means of notification . . . and if an RTU is not working properly, [it] will use a backup telephone."[4] It is also undisputed that the Contract requires Edison to maintain and repair the RTU. Since the RTU, the primary and official means of communicating an interruption, was broken during the dates in question, US Can alleges Edison breached the Contract.

In addition, because, and only because, Edison breached the Contract by failing to maintain the RTU, did Edison resort to use of the backup telephone for notification between November 15 and December 7, 2000. US Can's position is that if the RTU had been operational during that critical period, it would have received the notice to interrupt via the RTU, and based on its course of conduct under the Contract, it would have interrupted service.

US Can further alleges that use of the alternative notification method—the backup telephone—is not specifically identified in the Contract as a notification method. US Can argues that since Edison never utilized the backup telephone method for over five-and-a-half-years, US Can did not expect a notice to interrupt by telephone, nor did it have any experience in receiving notice in that manner.

2. Notice to Interrupt – Receipt of Notification

In addition to challenging the method of notification used by Edison, US Can also alleges that it has no evidence that it ever *received* the notice

[4] Transcript page 76, lines 16-19.

to interrupt. The Contract states **"[u]pon receipt by a customer of a notice of interruption from the company**, the customer shall reduce the Maximum Demand imposed on the electric system to the Firm Service Level within 30 minutes." (Emphasis added by US Can).

The US Can witnesses all testified that US Can has a program in effect to address the situation where Edison might use the backup telephone to give a notice to interrupt.[5] US Can produced the security guard logs from all the dates in question, November 15, and December 4-7, 2002. None of the logs contains an entry referencing a call received on the backup line, from Edison, notifying the company to interrupt on anyone of the five days in question. Since the "plain meaning" of the Contract is that *receipt* of notice is a precondition to a customer's obligation to reduce its power usage, and US Can did not *receive* notice according to its internal records, US Can asserts that it did not fail to interrupt upon *receipt* of notice. US Can therefore argues that the $76,306.50 penalty should not be imposed since the failure to interrupt was not knowing or willful.

B. Edison

From Edison's perspective, "[t]his is a simple and straightforward case. US Can received notice to interrupt, yet failed to do so."[6]

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[5] Richard Adkisson, Eduardo Bacha, and William Whitehead all testified that they had no knowledge that interruption notices were sent to US Can via the backup telephone line on the dates at issue. (Transcript, page 22, lines 17-19, page 29, lines 6-12, page 36, lines 13-17, and page 66, lines 21-23.)

[6] Edison's Opening Brief, page. 1.

1. Notice to Interrupt – Method of Notification

There is no question that the five notices to interrupt that Edison gave to US Can between November 15 and December 7, 2000, were all given by way of the backup telephone, not via the RTU. Edison concedes "[p]rimarily, a customer is notified to interrupt via the RTU, which is the official means of notification . . . . When the RTU is functioning properly, it is the only means for communicating an interruption . . . . When the customer's RTU is not operational, however, SCE will notify the customer to interrupt via the dedicated back-up telephone line."[7]

The Contract between Edison and US Can specifies that US Can must have a dedicated back-up telephone line, a line that is answered 24 hours a day/7 days a week, as an alternative method of notification if the RTU is not operational. US Can did have this dedicated back-up line. However, during the five years of US Can's participation in the interruptible program, there had never been any maintenance or repair problems with US Can's RTU until November 2000, and therefore US Can had never had to respond to a notice to interrupt via the back-up telephone. Edison concedes this point, but maintains that the back-up phone is required for the very reason it was needed, and used: to deliver the notice to interrupt to US Can when the RTU was not operational. Edison contends that the manner of notification, although an alternative method, constitutes sufficient notice under the terms of the Contract—sufficient to trigger US Can's obligation to interrupt or face a penalty.

[7] Edison's Opening Brief, pages 6 and 7.

Edison admits the RTU was not operational from November 7 to December 15, 2000, at which time it was repaired and back in service. Edison asserts that the repairs were "within its targeted repair timeframe of approximately 30 days,"[8] and therefore Edison was in full compliance with its obligations under the Contract to "maintain and repair" the RTU.

2. Notice to Interrupt – Receipt of Notice

Edison has records that it sent telephonic notice to US Can on each of the five event days. Notice was given by Edison's vendor, FirstCall Interactive Inc. (FirstCall), an out-of-state automated calling service. Edison has the computerized records from FirstCall that show the precise time a call was placed to US Can's back-up telephone, whether it was successful, whether it was answered, and the length of that call after it was answered.[9] A computer generates these summary reports to track the automated calls, and FirstCall sends these reports to Edison immediately after the calls are placed.

FirstCall also provided Edison with detailed call reports that show the exact details of the individual calls placed to US Can on the five dates at issue. These call reports confirm that each call was successfully placed, that US Can answered the phone, the message to interrupt was played, and the length the call recipient listened to the call. Edison asserts that the computerized records, combined with the detailed call reports, provide accurate data

[8] Edison Opening Brief, page 10, citing Wallenrod's Testimony, Ex. 3, page 14, lines 10-11.

[9] Edison's Opening Brief, page 27, citing Wallenrod's Testimony, Exhibit 3, page 6, lines 9-16, Attachments 5-15.

confirming that the calls were made on the dates and times in question and that US Can *received* the notices to interrupt.

In addition to the computerized records from FirstCall, Edison also produced long-distance telephone records from MCI WorldCom confirming that the FirstCall's automated calls to US Can generated charges. Even US Can conceded that if the automated calls were not answered, no long-distance charges would have been generated.[10]

V. Discussion

US Can as the complaining party has the burden of proof. In this proceeding US Can had to prove that it did not *receive* the five notices to interrupt. To that end, US Can submitted its security logs from the five event days. The security logs plainly do not contain any entries indicating that the back-up telephone line rang, was answered, and the notice to interrupt was received.

However, the testimony of US Can's witness, William Whitehead, was that the security guards were instructed, both verbally and in writing, to log in any calls received on the dedicated back-up phone line—even calls that were wrong numbers or dead air, and to contact a supervisor immediately.[11] The security logs from the five event days do not indicate the calls to interrupt and do not contain an entry for the five calls to end the period of interruption. What is particularly troubling about the reliability of the security logs is that the log for November 14, 2000, did not contain a notation for a "test" call to the back-up line

[10] Adkisson Testimony, Transcript, page 28, lines 1-6.

[11] Testimony of Whitehead, transcript, page 47. lines 18-28, page 48, lines 1-13, page 57, lines 21-28, page 58, lines 1-18.

that Edison made on that date. The November 14, 2000, log, however, does show an entry for an initial call notifying US Can to interrupt, and an entry for a call received shortly after that rescinding the notice to interrupt.

The testimony of the US Can witnesses was compelling that the company took its obligations under the interruptible contract seriously, and had a system in place to insure that the guards would properly respond to a call received on the dedicated back-up line. Unfortunately, the security logs contained, as Edison labeled them, "internal inconsistencies," that render them unreliable as evidence. The security logs are not reliable for determining what calls are received, or in this case, not received, in the guard-house at US Can's facility.

As a further example of the irregularities contained in the security logs, the security guards were to log in their hourly check-in calls to Pedus Security Company.[12] The logs submitted by US Can for November 15 and December 4-7 do not contain entries for all of these hourly calls to the security company.

There are additional inconsistencies and omissions from the security logs. Besides the dedicated back-up telephone, there is another phone in the guard-house. The guards are instructed to log in any calls on that phone line "when they have to do something, they have to contact somebody. If somebody calls in for a particular reason, they would record that."[13] The security logs for the five event dates do not contain any entries indicating that any phone calls were received, even on this non-dedicated telephone.

When the internal inconsistencies of the hand-written security logs are viewed in juxtaposition against the computer-generated records Edison

[12] Testimony of Whitehead, transcript, page 59, lines 26-3.

[13] Testimony of Whitehead, transcript page 50, lines 9-11.

produced from FirstCall and MCI, both independent third parties, the logs do not constitute proof that US Can did not receive the notices to interrupt. If the logs were reliable as evidence of all calls received in the guard-house on the back-up telephone line, the November 14, 2000, "test" call would have been on the log.

The calls generated by FirstCall are computerized messages. US Can, therefore, did speculate that there could have been "dead air" when the phone was answered, and therefore the security guard might not have stayed on the line to see if it was a "live" call. However, the system US Can had in place, as evidenced by the testimony of its witnesses and the written memoranda to the security guards, was that all calls—even "dead air" and wrong number calls—received on the back-up phone, were to be entered in the security log and a supervisor was to be contacted immediately. No entries for these calls are in the security logs, nor was a supervisor contacted. The Commission agrees with Edison that the omission of any entry for any of the ten calls, on the five event days, makes the logs unreliable as evidence that the calls were not received.

Therefore, pursuant to the terms of the Contract, since there is reliable evidence that Edison gave the notices to interrupt on the five event dates, and US Can does not have solid evidence that it did not receive the notices, US Can's failure to interrupt subjects it to the excess energy charge set forth in the tariff. While the Commission is convinced that US Can took its obligations under the Contract seriously, we infer that the guards were either absent, indifferent, or not properly trained and supervised as to the importance of calls received on the dedicated back-up telephone. Since US Can delegated the responsibility of answering the back-up telephone to the security guards, US Can is liable for their failure to properly respond to the calls to interrupt.

However, pursuant to the terms of the Contract, Edison had reciprocal obligations, including the duty to maintain and repair the RTU. In its performance of this duty, Edison tested the RTU once a month to insure its proper functioning. For five plus years, Edison tested US Can's RTU on a monthly basis, and the RTU was always found to be fully operational. On November 7, 2000, Edison performed its monthly test of US Can's RTU, and for the first time, determined that it was malfunctioning. These actions by Edison constitute a performance of its duty to maintain under the Contract.

Maintaining and keeping the RTU unit in repair is an integral part of Edison's interruptible program. Not only is the RTU the "official means" of notice of an interruption, but by its very nature is a superior means of notification. The RTU is a device that is placed inside US Can's facility and has a rotating beacon light. This beacon receives a satellite wireless feed and when a notice to interrupt is given via the RTU is by way of a very visible beacon light.

The Contract does not specify a timeframe in which Edison is obligated to repair the RTU unit. However, it is fair and reasonable to imply a 30-day repair time from (1) the frequency of inspections; (2) the clear superiority of the RTU for giving notice under the program; and (3) Edison's internal goal of completing repairs within "approximately 30 days from the date the repair order is issued."[14]

The Commission is cognizant that the time period of November and December 2000 was a critical point in the energy crisis, and therefore a time of extreme utilization by Edison of the interruptible program to relieve energy shortages and prevent power outages. This was also a time when it was more important than any other to have RTUs in prime working order.

[14] Wallenrod testimony, transcript, p. 109: 11-20.

Given the odd amalgam of circumstances (the RTU being broken for the first time while five event dates occurred during the RTU repair period—a period of 38 days), it is fair to offset US Can's excess energy charge by an assessment against Edison for the delayed repairs. If Edison met its target repair timeframe of approximately 30 days, and the repair order was initiated on November 7, 2000, the RTU should have been functioning by the time of the notice to interrupt, at 6:34 p.m. on December 6, 2000.[15] Therefore, US Can's excess energy charge is excused for December 6 and 7, 2000.

Edison is hereby directed to recalculate the excess energy charge assessed against US Can, and only assess the penalty for November 15 and December 4 and 5, 2000.

VI. Appeal of Presiding Officer's Decision

On July 1, 2002, the Presiding Officer's Decision (POD) was mailed to the parties. On July 31, 2002, Edison filed an appeal of the POD. US Can filed a response to Edison's appeal on August 15, 2002.

We have carefully considered the appeal and find Edison's arguments without merit. We also note that most of the issues raised by Edison on appeal do not address errors of law or fact and do not constitute a basis for appeal.[16] However, Edison did make some suggestions for clarification concerning the precedential value of the decision, and we adopt the concept that the decision

[15] Exhibit #35, FirstCall's Emergency Alert Report.

[16] Rule 8.2(e) permits an appeal of a POD only if the appellant believes the POD to be unlawful or erroneous. The purpose of an appeal is to alert the Commission to a potential error so that the error may be corrected, rather than to reiterate arguments that were already considered in the POD.

should be limited to US Can only and not be read as dictating broad policy changes for the interruptible program.

In order to clarify our decision, we shall address Edison's arguments below. Edison states on appeal that:

A. The POD erroneously finds that Edison delayed in repairing US Can's RTU.

The POD provided a basis for determining that a 30-day repair time frame was fair and reasonable from (1) the frequency of inspections; and (2) the superiority of the RTU for giving notice under the program. Although not reiterated in the POD, Edison testified that it had an internal goal of completing repairs within approximately 30 days from the date the repair order is issued. In addition, Edison performed a standard monthly test, on the first Tuesday of each month, to confirm that US Can's RTU was functioning properly. When all of these factors are considered, especially in light of the particular circumstances surrounding the facts in this case, there is no error in the POD's determination that 30 days is a reasonable length of time for repairs. However, to clarify the decision, additional factors are added to the discussion section at page 13, paragraph 3, and to Conclusion of Law 4.

B. The POD miscalculates the 30-day time frame.

The POD determined that Edison learned that US Can's RTU was malfunctioning during a regular monthly inspection on November 7, 2002. Based on that date, the POD calculated that if the repair had been made within 30 days, the RTU would have been functioning by close of business on December 6, 2000. There is no contract, case, statute, or Commission rule that dictates how the days should be calculated. Therefore, it is reasonable that the

Presiding Officer began counting the days on November 7, and ended on December 6, 2000.

C. The Decision's imposition of a strict 30-day repair timeframe is not appropriate.

We have reviewed Edison's arguments on appeal, and we agree that the POD should clearly limit the findings to the facts and circumstances of this case, and not create a binding 30-day repair timeframe for all cases and circumstances. Edison presented compelling arguments against the creation of an across-the-board policy concerning a timeframe for repairs, and we clarify that this decision is not creating a new policy and is limited to US Can only, and to this proceeding.

D. Back-up Notification System

Edison also contends that the POD will provide for a back-up notification system for only 30 days, after which the RTU will become the exclusive means of notification, whether the RTU is operational or not. This is not the intent or the result of the POD. The Commission is not creating a new policy or rule governing time limits for back-up notification systems. As noted above, this holding is specific to US Can and the facts of this case, and will not be applied generally to other interruptible customers.

E. Would US Can have interrupted if it received notice?

Edison alleges that there is not sufficient evidence on the record to find that US Can would have interrupted, if it had received notice to interrupt. To the contrary, there is evidence that US Can never failed to interrupt when it received notice to interrupt that was not voluntary. In addition, there is evidence that US Can took its obligations under the interruptible contract seriously. However, the POD found that US Can did not follow through with sufficient training or

supervision of the independent security guards to insure that calls to interrupt were properly routed to ensure compliance.

VII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Carol Brown is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. US Can and Edison are parties to a contract for interruptible service dated May 12, 1995.

2. The terms of the contract impose obligations on US Can to allow for the installation of specified interruption equipment, including a back-up telephone line, and US Can is obligated to interrupt its service upon receipt of notification to interrupt from Edison.

3. Edison is to install, maintain, and repair the notification equipment and notify US Can when it is required to interrupt its service.

4. For over five years, from May 1995 until November 2000, Edison tested US Can's automatic notification system, the RTU, on a monthly basis, and the RTU was always fully operational.

5. From May 1995 through November 14, 2000, all notices to interrupt that Edison gave to US Can were by way of the RTU.

6. From May 1995 through November 14, 2000, US Can always interrupted its service whenever it received a compulsory notice to interrupt from Edison by way of the RTU.

7. On November 7, 2000, Edison tested US Can's RTU and determined that it was malfunctioning.

8. Edison alerted US Can on November 14, 2000, that the RTU was broken and until it was repaired, all notices to interrupt would be by way of the back-up telephone.

9. On November 15 and December 4-7, 2000, Edison gave US Can notices to interrupt by way of an out-of-state automated calling service that utilized the back-up telephone line.

10. US Can has no internal records that it received the notices to interrupt by way of the back-up telephone line on November 15 and December 4-7, 2000, and US Can did not interrupt its service on those dates.

11. Edison produced reliable records from independent third party vendors evidencing the fact that it gave, and US Can received, notices to interrupt on November 15 and December 4-7, 2000.

12. US Can's security logs for the event dates in question, November 15 and December 4-7, 2000, that do not show any entries for the five calls to interrupt, nor for the five calls to end the interrupt, are not reliable evidence that US Can did not receive the five notices to interrupt.

13. Edison repaired US Can's RTU, and it was back in operation on December 15, 2000.

14. US Can received a bill from Edison reflecting an excess energy charge of $76,306.50 for US Can's failure to interrupt on the five event dates.

Conclusions of Law

1. The terms and conditions of the interruptible tariff allow for the assessment of an excess energy charge if Edison gives, and an interruptible customer receives, a notice to interrupt and fails to interrupt.

2. US Can's failure to interrupt upon the five notices to interrupt on November 15 and December 4-7, 2000, subject it to excess energy charges for those dates, charges determined in accordance with the contract and tariffs.

3. Edison determined on November 7, 2000, that US Can's RTU was not functioning, and took until December 15, 2000, to repair the unit and have it back in operation. This period of 38 days is in excess of Edison's repair timeframe of approximately 30 days.

4. Since US Can's failure to interrupt on December 6 and 7, 2000, can be attributed to Edison's failure to have repaired the RTU within its own internal time goal of 30 days, it is appropriate to excuse US Can's excess energy charge for those dates.

5. This order should be effective today to allow the parties to determine the appropriate excess energy charge and refund to US Can its payment for December 6 and 7, 2000.

O R D E R

IT IS ORDERED that:

1. Southern California Edison is to recalculate the excess energy charge due from US Can to Edison, assessing the penalty for failing to interrupt for November 15 and December 4 and 5, 2000.

2. Edison is to notify the Commission's fiscal office of the recalculated charge, and fiscal is then to issue Edison a check for the charge, and refund the excess on deposit to US Can.

3. This proceeding is closed.

4. This order is effective today.

Dated _____, at San Francisco, California.